

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Excise Appeal No.76950 of 2018

(Arising out of Order-in-Appeal No.07/SLG-CGST/2018 dated 27.04.2018 passed by Commr. (Appeals) of CGST & Excise, Siliguri)

M/s Varun Beverages Ltd.

JL-47,Barhans Fartabad, Charaktala, P.O.Garia, Dist.-24 Parganas (South)

Appellant

VERSUS

Commr. of CGST & Excise, Kolkata South

180, Shantipally,
Rajdanga Main Road,
Kolkata-700107

Respondent

APPEARANCE :

Shri S.P.Majumdar, Advocate for the appellant

Shri H.S.Abedin, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.77090/2019

DATE OF HEARING : 23.12.2019

DATE OF PRONOUNCEMENT : 22.09.2020

PER P.K.CHOUDHARY :

The facts of the case in brief are that the appellants are engaged in the manufacture of water, aerated water, fruit pulp based drinks, Beverages in Bag (BIB) etc. classifiable under Central Excise Tariff Sub-Heading Nos.22019090, 22021010, 22011020, 22029020 & 21069050 of the Central Excise Tariff Act, 1985. The appellants were availing cenvat credit on various inputs, input services and capital goods in terms of the provisions as laid down under the Cenvat Credit Rules, 2004. The appellants had entered into an agreement with M/s Nicco Parks and Resorts Ltd. for sale of their products from the latter's

premises. For this purpose, the appellants paid upfront fees and also made payment based on quantity sold during the Financial Year 2013-2014 and 2014-2015. The scrutiny revealed that the appellants availed cenvat credit of service tax paid on invoices raised by M/s Nicco Park and Resorts Ltd. towards the sales commission, which accordingly to the show-cause notice, did not qualify as eligible input service.

2. The Adjudicating Authority disallowed the cenvat credit on input services amounting to Rs.2,60,833/- and confirmed the demand of Central Excise duty under Rule 14 of Cenvat Credit Rules, 2004 read with the provision to Section 11A (10) of the Central Excise Act, 1944, along with applicable interest and also imposed equal amount of penalty under Sub-Rule 2 of Rule 15 of Cenvat Credit Rules, 2004 read with the provision to Section 11AC of the Central Excise Act, 1944. An option to pay reduced penalty @ 25% was also given.

3. On appeal, the lower Appellate Authority upheld the order of the Adjudicating Authority. Hence the present appeal before the Tribunal.

4. The Ld.Advocate appearing on behalf of the appellant, submitted that for the services received from M/s Nicco Parks, the appellants paid sales commission in the form of upfront charges as well as based on the quantity sold. As per the agreement between the appellants and M/s Nicco Parks, the latter was prohibited from selling or displaying the products of any other manufacturers and to sell the products of the appellants only. M/s Nicco Parks raised invoices for the sales commission together with service tax on such sales commission. The appellants availed cenvat credit of the service tax so paid considering the same as eligible input service, which was linked with the sale as well as sales promotion of their product. The Ld.Advocate made the Bench go through the definition of "input service" as defined in the Cenvat Credit Rules, 2004. He also referred to the Department's Circular No.943/4/2011-CX. dated 29.04.2011 at Sl.No.5 and the Board's Instruction F.No.96/85/2015-CX.I dated 07.12.2015 at Point No.B.30. The Ld.Advocate further submitted that the issue whether the definition of "input service" specified under Rule 2 (I) of the Cenvat Credit Rules, 2004 as it stood prior to 3rd February, 2016, covers sales commission as

eligible "input service" and the effect of the Explanation what has been added to the definition w.e.f.03.02.2016. He vehemently submitted that the Explanation inserted under Rule 2 (I) w.e.f. 03.02.2016, has the retrospective effect so as to cover the period upto 03.02.2016. In support of his submissions, he relied upon the following decisions :

- (i) 2016 (335) ELT 660 (Tri.-Ahmd.)-Essar Steel India Ltd. Vs. CCE & ST, Surat I ;
- (ii) 2019 (28) GSTL 309 (Tri.-Mumbai) – Reliance Industries Ltd. Vs. CCEx. & ST, (LTU, Mumbai ;
- (iii) 2018 (363) ELT 1172 (Tri.-All.) – Simbhaoli Sugar Ltd. Vs. CCEx., Meerut II ;
- (iv) 2016 (41) STR 1004 (Tri.-Del.) – Carrier Airconditioning & Refrigeration Ltd. Vs. CCEx., Gurgaon ;
- (v) 2017 (50) STR 37 (Tri.-All) – CCEx. & S.Tax, Meerut II Vs. Dwarikesh Sugar Industries Ltd. ;
- (vi) 2017 (3) GSTL 137 (Tri.-Bang.) Stanley Seating Vs. CCEx., Bangalore III ;
- (vii) 2017 (3) GSTL 177 (Tri.-All.) CCEx., ST, Hapur Vs. Genus Paper Boards Ltd. ;
- (viii) 2017 (52) STR 370 (Tri.-Del.) CCEx & ST, Meerut I Vs. Plastiblends India Ltd. (Unit I) `
- (ix) 2016 (46) STR 416 (Tri.-Del.) Bajaj Hindustan Ltd. Vs. CCEx., Lucknow.

The Ld.Advocate further submitted that the major portion of the demand is barred by limitation in terms of Section 11A (4) of the Act. It is his submission that the conditions precedent namely, fraud, collusion, willful mis-statement, suppression of facts etc. with an intention to evade payment of duty for invoking longer period of limitation are totally absent in this case. The appellants duly reflected all the cenvat credits availed by them in the Cenvat Credit Registers and for all the months, the Cenvat Credit Registers were submitted to the Department. ER I Returns accompanied with the related Cenvat Credit Register, giving whatever particulars required under the law so far as the availment of cenvat credit is concerned, had been regularly

submitted. The details of the credit could not be mentioned therein as there was no scope to furnish any such details. He vehemently argued that the Department was not prevented from making up its mind in the matter for issuance of the show-cause notice within the normal period of limitation. In support of his submission, he relied on the various decisions and some of them are as under :

- (i) 2017-TIOL-463-CESTAT-DEL : CCE,Raipur Vs. M/s Drolia Electro Steel Pvt. Ltd.
- (ii) 2016-TIOL-1959-CESTAT-DEL : CCE & ST Vs. ZYG Pharma Pvt. Ltd.
- (iii) 2016-TIOL-1967-CESTAT-HYD : M/s Ultretech Cement Ltd. Vs. C & CCEX.
- (iv) 2017 (49) STR 84 (Tri.-Hyd.) : CC,CE & ST Vs. Sri Sai Sindhu Industries Ltd.

5. Ld.D.R. for the Revenue, submitted that the credit availed by the appellant-assessee being sales commission in nature, does not qualify as eligible input services credit as per the judgement of the Hon'ble High Court of Gujarat in the case of M/s Cadila Healthcare Ltd. as reported in 2013-TIOL-12-HC-AHM-ST. He further submitted that the cenvat credit has been rightly disallowed and the impugned order should be upheld and the appeal filed by the appellant assessee be dismissed.

6. Heard both sides and perused the appeal records.

7. I find that the sales commission is directly attributable to sales of the products. Any activity which amounts to sale of the products is deemed to be sales promotion activity in the normal trade parlance. The commission paid on sales of the products/services with an intention to boost of the Company. The commission paid on sales becomes part of sales promotion resulting in increased manufacturing activity. The sales commission has a direct nexus with the sales, which in turn is related to the manufacture of the products. If there is no sale, there would not be any need to manufacture the products. Be that so as it may, to increase the manufacturing activity an encouragement is being given by way of sales commission for achieving increased sales.

8. I also observe that the Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas : 2012 (25) STR 348 (P & H), had clearly held that the sale and manufacture are directed inter-related and the commission paid on sales needs to be accounted for as services related to sales promotion. Further, I follow the ratio of the decision of the Division Bench of this Tribunal in the case of Essar Steel India Ltd. cited supra, wherein the Tribunal, after discussing all the previous cases and Rules of interpretation, have held that the "Explanation" inserted in Rule 2 (I) of Cenvat Credit Rules, 2004 vide Notification No.2/2016-CE (N.T.) dated 03.02.2016 is declaratory in nature and is applicable retrospectively.

9. In view of the above discussions, the impugned order cannot be sustained and is, therefore, set aside.

10. The appeal filed by the appellant is allowed with consequential relief as per law.

(Pronounced in the open court on **22.09.2020**)

Sd/
(P. K. Choudhary)
Member (Judicial)

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